

## Additional Dissenting Views of Rep. Howard L. Berman

The minority dissenting views make several important points about the constitutional standard for impeachment and the appropriate role of the House of Representatives in the impeachment process. I strongly agree with the conclusion that the President's conduct is not impeachable. Nevertheless, I have elected not to sign the minority views because I believe they place too much emphasis on attempting to prove that the President did not lie under oath and possibly coach a potential witness. In addition, while I am troubled by the conduct of the Independent Counsel, I don't believe it should play a central role in the impeachment debate. Rather, that conduct should be investigated in the context of reauthorizing the Independent Counsel statute in the 106th Congress. I have therefore decided to submit my own dissenting views, which consists of my December 10, 1998 opening statement made prior to the mark up of the articles of impeachment.

### Statement of Rep. Howard L. Berman Before the Committee on the Judiciary December 10, 1998

Thank you Mr. Chairman.

The often repeated mantra that everybody lies, certainly everybody lies about sex, all Presidents lie, and many Presidents have affairs must be addressed from this side of the aisle.

It's certainly true that people sometimes lie, and that people often lie about sex. It is also true that Presidents have been known to lie and that some Presidents have had affairs.

But that mantra has nothing to do with the issues before us.

That mantra does not address the allegations of lying under oath or coaching potential witnesses in legal proceedings in order to evade responsibility for personal wrongdoing.

Our proceedings are too momentous to be bogged down by this political spin.

What is an impeachable offense? A precise definition is difficult to glean from the Framers of the Constitution, American history or scholarship.

I find the best answer, albeit on a different subject, contained in the concurring opinion of Supreme Court Justice Potter Stewart from which I quote:

"... the court ... was faced with the task of trying to define what may be indefinable ... I shall not today attempt further to define the kinds of material I understand to be embraced

... and perhaps I could never succeed in intelligibly doing so... But I know it when I see it."

Justice Stewart was ruling on the definition of obscenity -- not impeachment -- and given his subject matter, some may think this analogy too apt.

But, as regards the basic concept of what constitutes an impeachable offense, for me, the logic applies: I know it when I see it.

And on balance, given the totality of the wrongdoing, and the totality of the context, this isn't it.

In fact, though reasonable people may disagree, I don't think it's a close call.

The President's behavior that reflects so badly on the Presidency and the country, the President's disregard for his obligations as a law-abiding American, the President's refusal to respect a common sense interpretation of the English language ... this conduct does not rise to the level that justifies thwarting the public's mandate as expressed in the 1996 election.

My vote to oppose impeachment turns on three factors:

The first factor is though this is not just about sex, it is colored by sex.

Second, and more importantly, impeachment must not be pursued if the center of gravity of the body politic opposes impeachment.

We are privileged to live in a unique and wonderful system. Every four years, we come together to elect a President. This is the defining moment in American political life and is portentous in its implications.

Each American takes responsibility, and as a whole, all America takes collective responsibility for the decision to invest awesome power in this one person.

There must have been a reason why the Framers vested this power of impeachment in a political body, the people's house -- the House of Representatives.

If they had wanted impeachment to be a non-political decision, totally divorced from public opinion, they would have vested the impeachment powers in the judicial branch.

The impeachment process must, at a minimum, pay some deference to the totality of the people's views. Unlike every other vote we cast where conscience may play a determinative role regardless of public opinion, a vote for impeachment cannot be blind to the views of those who vested power in the President.

It would be very, very wrong to expunge the results of an election for President of the United States without the overwhelming consent of the governed.

It should not be contemplated -- unless the wrongdoing is so egregious as to threaten our form of government.

The third factor in my decision is the belief that the corrosive effects on American society and America's legal system of allowing the President to serve out his term have been overstated. It is true the President's defense is very troubling. His grand jury testimony, his public statements following the grand jury testimony, his agents' public statements, and his answers to the questions submitted by the Committee are more serious than any wrongdoing that caused this process to begin.

There is something Alice in Wonderland-like in watching someone so smart and so skilled, so admired by the American people for his intellect and his talents, digging himself deeper and deeper and deeper into a rabbit hole, and us along with him -- and allowing him to escape accountability.

This troubles me greatly and I know motivates many of the calls for impeachment.

People do have a right to ask, what will America's children believe about lying, about reverence for the law, about lying under oath? Will more Americans think it is ok to lie under oath if the subject matter is sex, or if the subject matter is embarrassing, or to evade civil liability in a sexual harassment suit, or to evade criminal liability?

Many thoughtful Americans wonder whether the deconstruction of our language -- the hair-splitting -- will damage the culture even beyond the legal system. What will happen if words no longer have common sense meaning -- if everything is equally true... or not true, because, after all, it depends on what your definition of "is" is?

Of course there has been and will be harm to our culture and the legal system.

But let's keep it in perspective. This is not a court of law. We are not empowered to decide whether or not the President should be indicted or convicted of a criminal offense.

While not above the law, the President -- the most powerful man on the planet, the man who has control over our nuclear weapons arsenal, the man whom we vest with the authority to protect and defend the interests of the people of the United States, indeed, protect all of civilization -- is a special case!

Everybody is equal under the law. But we make special provisions for one person while he's serving as President.

Few would dispute the fact that the President is immune from criminal prosecution during his term of office. Many would argue that a wise Congress should pass legislation to immunize the President from civil litigation during his term of office.

We invest the Secret Service with the responsibility of taking the bullet so our Commander in Chief will serve out his term.

Most Americans can be criminally prosecuted at any time. Most Americans can be civilly sued at any time. Most Americans do not have a cadre of heroes providing personal protection for them and their loved ones.

That the President's conduct is not impeachable does not mean that society condones his conduct. In fact, it does not mean that the President is not subject to criminal prosecution after he leaves office.

It just means that the popular vote of the people should not be abrogated for this conduct -- when the people clearly do not wish for his conduct to cause the abrogation.

The point is, most Americans know -- and will instruct their children to know -- that conduct that may not be impeachable for the president of the United States is not necessarily conduct that is acceptable in the larger society.

Those who argue that the institutions of government, or the fabric of our society will be irreparably harmed by a failure to impeach the President, seriously underestimate the American people.

America is too strong a society, American parents are too wise, the American sense of right and wrong too embedded -- to be confused.

We all know that the word "is" has a common sense meaning;

We all know that lying under oath will get us in a lot of trouble.

I have anguished over the question, were the facts the same for a Republican President in a Democratically controlled Congress, would I vote to oppose impeachment?

I pray that my decision would be the same, regardless of party, regardless of political position.

I hope I've considered only what meets the Constitutional standard and what is best for America.

I find the answer unambiguous. Impeachment must be defeated.